UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, TOZZI, and KRAUSS
Appellate Military Judges

UNITED STATES, Appellee
v.
Corporal TIMOTHY D. KURTZ
United States Army, Appellant

ARMY 20130215

Headquarters, 1st Cavalry Division
Gregory A. Gross, Military Judge
Colonel R. Tideman Penland, Jr., Staff Judge Advocate

For Appellant: Major Amy E. Nieman, JA; Major Mary E. Braisted, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Major John K. Choike, JA; Captain Jihan Walker, JA (on brief).

16 March 2015

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of conspiracy to wrongfully sell military property, one specification of wrongful disposition of military property, and one specification of wrongful sale of military property in violation of Articles 81 and 108, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 881, 908 (2006). The military judge sentenced appellant to a bad-conduct discharge, six months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved four months of the sentence to confinement and the remainder of the sentence as adjudged.

This case is before the court for review under Article 66, UCMJ. Appellant assigns one error alleging dilatory post-trial processing and raises an additional matter by footnote, wherein he requests a new review and action because the convening authority failed to defer and waive forfeitures imposed as promised in the

pretrial agreement. We find no merit in the error assigned. We also find no merit to the matter raised by footnote because appellant's expiration of term of service (ETS) date, according to his Enlisted Record Brief, was seven days after trial, and adjudged and automatic forfeitures did not take effect in appellant's case until fourteen days after the date on which the sentence is adjudged. *See* UCMJ arts. 57(a)(1) and 58(b). However, on a related note we hold that under the circumstances of this case, it is best to disapprove the adjudged forfeitures.

On the matter of forfeitures, the pretrial agreement term in question stated:

> [T]he Convening Authority agrees to . . . [d]efer any adjudged forfeitures and any automatic forfeitures until action or my ETS date, whichever comes earlier, and, should action be taken prior to my ETS date, at action, to waive automatic forfeitures until my ETS date or for the maximum period allowed by law, whichever comes earlier, and disapprove adjudged forfeitures.

Interpretation of a pretrial agreement is a question of law that we review de novo. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). When interpreting pretrial agreements, general principles of contract law govern, except where those principles are outweighed by the Constitution's Due Process Clause protections guaranteed to an accused. *Id.*

We first analyze the language of the agreement itself. *Id.* This term could be read in one of two ways: either the convening authority agreed to disapprove adjudged forfeitures if action was taken before appellant's ETS date or the convening authority simply and separately promised to disapprove adjudged forfeitures. Since the term is ambiguous on its face, we may look to extrinsic evidence to determine the meaning of the ambiguous term. *Id.* The discussion between the military judge and appellant on the record does not satisfactorily clarify the parties' understanding of the pretrial agreement term. The record here could be read to reflect that the judge and appellant considered the promise to disapprove adjudged forfeitures as a separate guarantee.

In any event, appellant does not claim that this term was material to his decision to plead guilty. Indeed the record reveals that appellant well understood the likelihood that he may not enjoy the benefit of this term of the agreement.[*] Because appellant's ETS date came before the effective date of any adjudged

[*] Appellant attached an appellate exhibit to the record reflecting that understanding, but that exhibit could also be read to contain the same ambiguity as the term and its discussion described above.

forfeiture, he suffered no pecuniary harm as a result of the convening authority's approval of the adjudged forfeitures.

Nevertheless, it is appropriate for this court to resolve the ambiguity surrounding this term in favor of appellant and disapprove the adjudged forfeitures. Under the circumstances of this case, return of this record for new review and action, as requested by appellant, is unnecessary and inappropriate. This court's disapproval of the adjudged forfeitures constitutes an adequate remedy. *See generally United States. v. Lundy*, 63 M.J. 299, 302 (C.A.A.F. 2006); *id.* at 305 (Effron, J., concurring in part and in the result); *United States v. Davis*, 20 M.J. 903, 905 (A.C.M.R. 1985) ("Ambiguities in the interpretation of pretrial agreements are resolved in favor of the accused.").

The findings of guilty are AFFIRMED. We affirm only so much of the sentence as provides for a bad-conduct discharge, four months confinement, and reduction to the grade of E-1. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the sentence set aside by this decision, are ordered restored.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court